Supreme Court, U.S.
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NO. 97-943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CONRADO LOZANO,
Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Respondent

On Petition For Writ Of Certiorari To The
Court Of Appeals For The First Judicial District Of Texas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals properly overrule Lozano's complaint about the refused "assumption of the risk" instruction, given that the instruction was unnecessary, confusing and not substantially correct?

2. Did the court of appeal properly overrule Lozano's complaint about the refused "assumption of the risk" instruction, given that any error in refusing the instruction was harmless?

3. Did the court of appeals properly find the partial appellate record insufficient to prove that refusing the "assumption of the risk" instruction was harmful, given that significant parts of the statement of facts were omitted, including the testimony of Lozano's sole liability expert and Santa Fe's entire case-in-chief?

RULE 29.6 STATEMENT

The Burlington Northern and Santa Fe Railway Company ("BNSF") is the successor in interest to The Atchison, Topeka and Santa Fe Railway Company. Santa Fe Pacific Corporation owns all of BNSF's stock. BNSF's nonwholly owned subsidiaries are Alameda Belt Line, The Belt Railway Company of Chicago, Carnas Prairie Railroad Company, Central California Traction Company, Houston Belt & Terminal Railway Company, Iowa Transfer Railway Company, Kansas City Terminal Railway Company, Longview Switching Company, Metrovias S.A., M T Properties, Inc., The Oakland Terminal Railway, Paducah & Illinois Railroad Company, Portland Terminal Railroad Company, St. Joseph Terminal Railroad Company, Sunset Railway Company, Terminal Railroad Association of St. Louis, Texas City Terminal Railway Company, Trenes de Buenos Aires S.A., TTX Company, and The Wichita Union Terminal Railway Company.

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BRIEF IN OPPOSITION

Respondent The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") respectfully submits this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

A. Disposition Below

Lozano sued Santa Fe for negligence under the Federal Employers' Liability Act, alleging he hurt himself using a jack to bend a rail. Based on the jury's verdict (Lozano 60% negligent, Santa Fe 40% negligent), the trial court awarded Lozano $37,013.86. Nevertheless, Lozano moved for a new trial, claiming the trial court erred in refusing to instruct the jury on assumption of the risk. The motion was denied, and the court of appeals affirmed, issuing a "do not publish" opinion. The Texas Supreme Court denied Lozano's application for writ of error.

B. Statement Of Facts

1. Introduction: Deficiencies In The Record

Lozano claims the trial court erred in refusing to submit an "assumption of the risk" instruction. But as the court of appeals properly concluded, Lozano failed to obtain an adequate record for appeal. Specifically, the record omits the entire testimony of six of the 14 witnesses at trial, including Santa Fe's entire case-in-chief and Lozano's sole liability expert. Lozano's opening statement and closing argument are also omitted. (Tr. 128). What is omitted proves there was no need to instruct the jury on assumption of the risk; further, that failure to do so was harmless.

2. The Rail Bender And Lozano's Accident

As a Santa Fe trackman, Lozano's duties included replacing damaged track. (S/F Vol. II, 212-213). Because the rails in stock were straight, they had to be bent to replace curved track. (S/F Vol. I-A, 45-46, 51-53, 104, 114-117; Vol. II, 172-173). To bend rails, Lozano and others used a "rail bender", which is a jack similar to what we use to change automobile tires. (S/F Vol. I-A, 45-46, 79-82). Railroads have always used rail benders to bend rails; yet no one at trial could recall anyone but Lozano being hurt while bending a rail. (S/F Vol. I-A, 105-106; Vol. II, 69, 123-124, 130, 174, 202). Evidently, Lozano was the first.

All agreed that rail benders present risks which require due care. For instance, during the jacking process, any jack will tend to ride up the rail. (S/F Vol. I-A, 23-24, 39-40; Vol. II, 166). When that happens, the proper procedure is to stop jacking and reset the jack; otherwise, it will come off the rail. (S/F Vol. I-A, 23-24; Vol. II, 11-12, 124, 133, 166). Also, one must maintain a proper stance and good balance while jacking. This means having both feet on the ground, with one foot forward and the other behind. (S/F Vol. I-A, 102-103, 108110, 142-143; Vol. II, 171, 174; Vol. III, 289, 301). As Lozano admitted, it would be dangerous to operate the jack with one foot on the jack and the other on the ground. (S/F Vol. III, 301).

In 1991, Lozano and co-worker Bell were using the rail bender. As they pulled down on the lever bar, the jack came off the rail. (S/F Vol. II, 137; Px 2, 3; Dx 9). Nothing happened to Bell, who was in the proper defensive position. But according to Lozano's post-accident statement, Lozano was caught off balance with one foot on the jack. (Dx 21; S/F Vol. I-A, 103). Accordingly, he fell and sprained his neck. (S/F Vol. I-A, 103-104; Dx 13). In short, Lozano fell because he carelessly failed to assume a balanced, defensive stance while jacking--a violation of Santa Fe's safety rule 3002, which mandates: "Tools must be used defensively so that slipping or unexpected movement will not cause loss of balance or injury." (Dx 7).

3. The Trial

Lozano sued Santa Fe for negligence under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51. (Tr. 2-6). He claimed the rail bender was defective because one of its parts was slightly bent; alternatively, that Santa Fe should have purchased pre-bent rails to eliminate the need for rail bending. (S/F Vol. I-A, 51-52, 69; Vol. II, 223).

Santa Fe responded that the bent part on the rail bender played no role in the accident; further, that purchasing pre-bent rails was

impractical. Lozano's own witnesses all but conceded these facts. (S/F Vol. I-A, 96-97, 105-106, 114-117, 121; Vol. II, 163, 165, 172-174). Santa Fe also showed that Lozano's accident resulted from his failure to use the rail bender in accord with common sense and company safety rules. (S/F Vol. I-A, 102-103, 108, 110, 142-143; Vol. II, 171; Dx 7, 21, 34). Some of the best evidence of Lozano's negligence and Santa Fe's innocence was the testimony of Don Fisher, which Lozano omitted from the record. (Tr. 128).

Throughout the trial, Santa Fe maintained that rail bending was safe if done properly; further, that the rail bender was not defective. For that reason, Santa Fe never suggested that Lozano was negligent in consenting to use the rail bender. Instead, Santa Fe contended only that Lozano failed to use the rail bender in a safe manner. The notion that Lozano "assumed the risk" was never injected in the case. This would be perfectly clear if the appellate record included Santa Fe's case-in-chief and Lozano's closing argument.

4. The Verdict And Judgment

The jury found Lozano 60% negligent and Santa Fe 40% negligent. (Tr. 78-81). The trial court reduced Lozano's damages accordingly, awarding him $37,013.86. (Tr. 88). Thereafter, Lozano moved for a new trial, alleging error in the jury charge. (Tr. 90-112). The motion was denied. (Tr. 120).

REASONS FOR DENYING WRIT

I. LOZANO'S "ASSUMPTION OF THE RISK" INSTRUCTION WAS PROPERLY REFUSED BECAUSE IT WAS UNNECESSARY, CONFUSING AND NOT SUBSTANTIALLY CORRECT

A. Introduction: Contributory Negligence And Assumption Of The Risk

At the charge conference, Lozano's counsel tendered the following

instruction, not indicating where it should be placed in the charge:

> If the employee protests, but then performs the commanded task, the risk of injury does not shift to him.

(S/F Vol. III, 325). The trial court refused the instruction. (S/F Vol. III, 326; Tr. 85).

On appeal, Lozano claimed the refusal to submit the instruction was reversible error. Santa Fe responded that 1) the instruction was unnecessary, 2) Lozano failed to tender a substantially correct instruction, and 3) Lozano failed to prove harm. The court of appeals embraced the third argument:

> Assuming without deciding that the trial court erred in refusing Lozano's requested instruction, Lozano has not brought a sufficient record before this Court to show that the error harmed him.

Slip. Op. at 3. All three arguments are discussed below. But first, a brief discussion of contributory negligence and assumption of the risk is in order.

The FELA employs a pure comparative-negligence scheme that reduces an employee's recovery by his share of negligence. 45 U.S.C. §§51,53; *Fashauer v. New Jersey Transit Rail Operations,* 57 F.3d 1269, 1274 (3rd Cir. 1995). In 1939, Congress abolished the "assumption of the risk" defense by amending the FELA to provide that plaintiffs "shall not be held to have assumed the risks of . . . employment" in cases where the railroad is negligent or violates a safety statute. 45 U.S.C. §54; *Fashauer*, 57 F.3d at 1274.

By virtue of the 1939 amendment, an FELA plaintiff's recovery

cannot be reduced simply because he "implicitly consented to the risk by accepting employment with the railroad or by performing a task in the manner which the employer directed." *Fashauer,* 57 F.3d at 1280. Accordingly, if an employee receives a task and chooses to perform it in a negligent manner, recovery may be reduced. *Fashauer,* 57 F.3d at 1280 (choosing unsafe method over safer alternative is contributory negligence, as is failure to follow safety rules). But if the employee was specifically ordered to use the negligent method, recovery may not be reduced. *Jenkins v. Union Pacific R. Co.,* 22 F.3d 206, 211(9th Cir. 1994).

In our case, Lozano was told to use the rail bender. But no one suggested that Lozano was wrong to use the rail bender. To the contrary, Santa Fe argued that the rail bender was safe if properly used; further, that no one but Lozano had been hurt while using it. (S/F Vol. I-A, 105-106; Vol. II, 69, 123-124, 130, 174, 202). The only complaint directed at Lozano was that his manner of using the rail bender (improper stance, one foot on the jack) was careless and violated company rules.[1] No one told him to use the rail bender in that manner. He simply chose an unsafe method over a safer alternative. Accordingly, no "assumption of the risk" instruction was required.

B. The Standard Of Review And Controlling Law

Tex. R. Civ. P. 277 requires the trial court to submit instructions that are "proper to enable the jury to render a verdict." Trial courts have wide latitude in this regard, and their decisions are reviewed for abuse of discretion. *Magro v. Ragsdale Bros. Inc.,* 721 S.W.2d 832, 836 (Tex. 1986). The test for abuse of discretion is whether the trial court acted arbitrarily, without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241-242 (Tex. 1986), *cert. denied,* 476 U.S. 1159 (1986).

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[1]Lozano's post-accident statement admitted he had one foot on the jack. (Dx 21; S/F Vol. I-A, 103). At trial, he said that would be dangerous, but attributed his post-accident statement to a "ghost". (S/F Vol. III, 296, 301).

It is appellant's burden to present an appellate record that establishes abuse of discretion. Tex. R. App. P. 50(d). What is omitted from the record must be presumed to support the ruling. *Salley v. Houston Lighting & Power Co.,* 801 S.W.2d 230, 232 (Tex. App. - Houston [lst Dist.] 1990, no writ).

When FELA cases are tried in state court, state rules on "the form, necessity, and effect" of explanatory instructions apply if they do not interfere with a substantive FELA right or defense. *Scott v. Atchison, Topeka and Santa Fe Railway Co.,* 572 S.W.2d 273, 281 (Tex. 1978)(state law governed whether "act of God" instruction should follow definition of "negligence"); *Mitchell v. Missouri-Kansas-Texas R. Co.,* 786 S.W.2d 659, 661-662 (Tex. 1990)(state law governed propriety of "negligence" instruction that required proof of foreseeability).[2] According to *Scott* and *Mitchell,* the trial court's ruling must be reviewed under standards of state practice, not federal practice. But as shown below, the ruling was proper under any standard.

C. Lozano's "Assumption Of The Risk" Instruction Was Not Necessary

Texas law forbids explanatory instructions that are unnecessary or confusing. Tex. R. Civ. P. 277; *Acord v. General Motors Corp.,* 669 S.W.2d 111, 115-116 (Tex. 1984). Federal courts generally condemn "assumption of the risk" instructions as unnecessary and confusing. See *Clark v. Burlington Northern, Inc.,* 726 F.2d 448, 452 (8th Cir. 1984) (instruction "generally condemned"); *Casko v. Elgin, Joliet and Eastern Ry. Co.,* 361 F.2d 748, 751 (7th Cir. 1966) (no instruction if abolished defense "neither pleaded nor argued"); *Fashauer,* 57 F.3d at 1281 (no instruction unless abolished defense is argued).

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[2]See also, *St. Louis Southwestern Ry. Co. v. Marks*, 749 S.W.2d 911, 913-915 (Tex. App. - Texarkana 1988, writ den.) (propriety of explanatory instruction in FELA case governed by state law, which gives trial court broad discretion).

However, if an employee is blamed for performing a task in the manner that the employer specifically ordered, an "assumption of the risk" instruction may be needed to eliminate the danger of finding the employee negligent simply because he did what was specifically ordered. *Fashauer*, 57 F.3d at 1280. The critical issue is whether the trial court abused its discretion in finding no such danger; better yet, whether the appellate record clearly shows such an abuse.

1. No "Assumption Of The Risk" Defense Was Raised

No "assumption of the risk" instruction was needed because no such defense was raised. Santa Fe never suggested that Lozano should be found negligent simply because he used the rail bender. To the contrary, Santa Fe consistently maintained that the rail bender was safe if used properly. All of Santa Fe's evidence pointed unequivocally to the proposition that Lozano was at fault because he used the rail bender carelessly and in violation of company safety rules. He was not blamed for using the rail bender; he was blamed for using it incorrectly. Santa Fe's closing argument makes this clear. (S/F Vol. III, 327-350).

Lozano suggests Santa Fe injected "assumption of the risk" into the case. As explained below, this is false. Lozano argued that the rail bender was defective and presented abnormal, unreasonable risks; further, that Lozano's accident was proof. Santa Fe responded that the rail bender presented the same risks as any other rail bender; hence, it was not defective or abnormal. Santa Fe also argued that many necessary activities present risks, but that does not mean it is unreasonable to perform the activity or have an employee do so. These arguments were clearly directed at Lozano's negligence claim. None of them remotely suggested that Lozano should be found negligent simply because he used the rail bender. (S/F Vol. III, 330-333).

In addition, Santa Fe claimed Lozano was negligent in his manner of using the rail bender. Accordingly, Santa Fe argued that rail bending presented risks which Lozano knew or should have known would arise if he was careless. However, Santa Fe's argument was clearly directed

at the careless manner in which Lozano used the rail bender, not the fact that he used it. (S/F Vol. III, 335-338).

In short, Santa Fe merely sought to prove 1) the fact that an accident happened does not mean there was negligence or defective equipment, 2) the fact that rail bending presents risks does not mean asking someone to rail bend is negligent, and 3) Lozano was careless in the manner in which he used the rail bender. Accordingly, the trial court properly found that no "assumption of the risk" instruction was necessary. The evidence in the record proves this, as does the evidence omitted from the record.

2. The Trial Court's Ruling Complied With Federal Practice

As noted above, whether the trial court abused its discretion in refusing Lozano's explanatory instruction should be determined in light of state procedure and practice. However, even if federal practice governs, the trial court's ruling was proper.

In *Fashauer*, 57 F.3d at 1280-1281, the court rejected an argument like Lozano's. There, the FELA plaintiff slipped while standing in a vestibule with a wet floor. The railroad claimed he was negligent--not because he was in the vestibule (where he was supposed to be), but because he was not holding on to the handrails. In that regard, the railroad said at trial that "plaintiff is not a newcomer to the railroad"; further, that he knew the floor was wet. On appeal, plaintiff argued that the railroad's statements illicitly brought "assumption of the risk" into the case; hence, the trial court should have submitted an instruction on the matter. The court of appeals disagreed, observing that the railroad's statements merely indicated that the plaintiff should have known the risks of not grabbing the handrail, not that the plaintiff should have refused to remain in the vestibule. In the court's words:

> [D]efense counsel did not use these observations to build an argument that Fashauer should not have performed his

> job. Rather, she argued that he acted unreasonably in performing the task in the manner in which he did, and that the condition Fashauer encountered was not abnormal and therefore not proximately caused by (defendant's) negligence.

Fashauer, 57 F.3d at 1281. Lozano's use of the rail bender is analogous to Fashauer's presence in the vestibule, and Lozano's failure to use the rail bender properly is analogous to Fashauer's failure to grab the vestibule's handrails. Just as the railroad never suggested Fashauer was wrong to be in the vestibule, Santa Fe never suggested Lozano was wrong to use the rail bender. Accordingly, because no "assumption of the risk" instruction was warranted in *Fashauer*, none was warranted at bar.

Like *Fashauer*, most federal courts have condemned "assumption of the risk" instructions in FELA cases. In all the following cases, the courts found that giving "assumption of the risk" instructions was improper: *Casko*, 361 F.2d at 751("assumption of the risk" instruction "serves only to obscure the issues in the case"); *DeChico v. Metro-North Commuter R.R.*, 758 F.2d 856, 861 (2nd Cir. 1985)("assumption of the risk" instruction "particularly inappropriate ... where it might well cause such confusion as to water down or even eliminate the issue of contributory negligence"); *Clark*, 726 F.2d at 452("assumption of the risk" instruction in FELA cases "generally condemned"); *Heater v. Chesapeake and Ohio Ry. Co.*, 497 F.2d 1243, 1249 (7th Cir. 1974), *cert. denied*, 419 U.S. 1013 (1974)("assumption of the risk" instruction a "confusing negative statement which refers to issues not involved in a FELA case").

In claiming he was entitled to an "assumption of the risk" instruction simply because he was told to use the rail bender, Lozano misreads *Jenkins*, 22 F.3d at 208-212. In *Jenkins*, the employee was injured because he jumped on a moving flatcar. Despite evidence that the railroad specifically told him to jump on the flatcar, the railroad contended that such conduct violated company rules. What warranted

the "assumption of the risk" instruction was not the mere fact that the railroad ordered a task which presents risks; rather, it was the railroad's suggestion that the employee was wrong to do what he was specifically ordered to do.

Jenkins would apply to our case only if Santa Fe had 1) specifically ordered Lozano to maintain an improper stance while using the rail bender, or 2) argued at trial that Lozano was wrong to use the rail bender at all. But neither event occurred. To employ the language of *Jenkins,* Lozano received a "general order" to use the rail bender, not a "specific order" to use it in a negligent manner. The negligent manner was his choice, and it constitutes contributory negligence. There was no "assumption of the risk" issue.

The bottom line is that the railroad's order to use the rail bender did not warrant an "assumption of the risk" instruction. What is in the record and omitted from the record proves there was no abuse of discretion; moreover, the record deficiencies preclude finding otherwise.

D. Lozano's "Assumption Of The Risk" Instruction Was Confusing And Not Substantially Correct

We have argued that no "assumption of the risk" instruction was necessary under state or federal law. But there is another reason to affirm the rulings below. The instruction that Lozano tendered was confusing and not substantially correct. Therefore, it was properly refused; moreover, Lozano waived his complaint. As Tex. R. Civ. P. 278 states, the failure to submit an instruction is not grounds for reversal unless the tendered instruction is "substantially correct". See *Placencio v. Allied Indus. Int'l. Inc.,* 724 S.W.2d 20 (Tex. 1987) ("substantially correct" means correct in substance and not affirmatively incorrect).

If Santa Fe had argued that Lozano was wrong to use the rail bender at all, or if Santa Fe had ordered Lozano to use the rail bender with one foot on the jack, then the following "assumption of the risk" instruction

might have been proper:

> You may not find contributory negligence on the part of the plaintiff simply because he acceded to the request or direction of the responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.

Fashauer, 57 F.3d at 1278, quoting *Joyce v. Atlantic Richfield Co.*, 651 F.2d 576, 683 (10th Cir. 1981). However, instead of tendering a correct instruction, Lozano tendered a confusing misstatement of law:

> If the employee protests, but then performs the commanded task, the risk of injury does not shift to him.

(Tr. 85).

Compare the correct "assumption of the risk" instruction with Lozano's "protest" instruction. The correct instruction says "don't blame the employee for doing his job (rail bending) in a certain manner (one foot on the jack) if that manner was specifically ordered." Lozano's instruction says "don't blame the employee for doing his job in **any** manner if he protested the job at the outset." That is quite a difference. For example, suppose that when asked to use the rail bender, Lozano said "I protest", then got drunk and proceeded to use the rail bender -- with one foot on the jack. The correct instruction would permit finding contributory negligence. But Lozano's instruction would preclude finding contributory negligence; after all, he protested, then performed the commanded task.

Lozano's "protest" instruction was confusing and wrong. Accordingly, the trial court had discretion to refuse the instruction; alternatively, Lozano waived his complaint. Either way, reversal is precluded.

II. ANY ERROR IN REFUSING THE "ASSUMPTION OF THE RISK" INSTRUCTION WAS HARMLESS

No error is ground for reversal unless the record shows it probably caused an improper judgment. Tex. R. App. P. 81(b). What is omitted from the record must be presumed to render any error harmless. *Christianson v. Prezelski,* 782 S.W.2d 842, 843 (Tex. 1990).

Lozano failed in his burden to show harm. The evidence in the record and omitted from the record proves there was no improper judgment; moreover, that Lozano would have fared no better with a correct "assumption of the risk" instruction. As the court of appeals properly concluded, the partial record before this Court precludes finding harmful error.

Lozano argues that federal law overrides *Christianson* by mandating reversal without regard to harm and no matter how incomplete the appellate record is. In this regard, Lozano misplaces reliance on *Norfolk & Western R. Co. v. Liepelt,* 444 U.S. 490 (1980). *Liepelt* did not address "assumption of the risk" instructions or the failure to produce an adequate record; rather, it addressed the need for an instruction that personal injury awards are not taxable.

Lozano reads *Liepelt* too broadly. *Liepelt* did not preempt state appellate law in FELA cases. Nor did it hold that any error in an FELA jury charge mandates reversal without regard to harm or the adequacy of the appellate record. *Liepelt* merely held that a tax instruction is needed to make sure the FELA measure of damages is applied. As for the harm caused by the absence of the tax instruction, *Liepelt* observed 1) most citizens wrongly assume personal injury awards are taxable and may tend to inflate verdicts accordingly, and 2) the jury's award in *Liepelt* greatly exceeded the estimate of plaintiff's own expert, suggesting an inflated verdict.

In short, *Liepelt* does not abolish the requirement of harmful error in FELA appeals. And even if the absence of the tax instruction is presumed harmful, it hardly follows that the absence of an "assumption of the risk" instruction mandates reversal without regard to what the record shows.

In refusing to reverse without an adequate statement of facts, the court of appeals properly followed *Christianson* and should be affirmed.

CONCLUSION

For the above reasons, Lozano's petition for writ of certiorari should be denied.

Respectfully submitted,

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